Supreme Court, U.S.
FILED

94 948 NOV 25 1994

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

LEONARD KUCINSKI,
Petitioner

vs.

MORNING CALL, INC.
Respondent

**On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit**

PETITION FOR WRIT OF CERTIORARI

Richard J. Orloski,
Counsel for Petitioner
ORLOSKI & HINGA
111 N. Cedar Crest Blvd.
Allentown, PA 18104
(610) 433-2363

78pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER OR NOT THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENIED PLAINTIFF HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL BY VACATING THE JURY'S VERDICT OF $100,000.00 IN FAVOR OF PLAINTIFF UNDER THE TRIAL COURT'S BLATANTLY ERRONEOUS STANDARD THAT THE FACTS MUST BE VIEWED IN A LIGHT MOST FAVORABLE TO THE **"VERDICT LOSER"** BECAUSE THE "VERDICT LOSER" WAS A NEWSPAPER/EMPLOYER?

II. WHETHER OR NOT THE TRIAL COURT INDICATED A BLATANT BIAS AGAINST PLAINTIFF BY EXCLUDING TESTIMONY ON THE AGE CLAIM THAT THE NEWSROOM STAFF WAS REFERRED TO AS "THE KIDDIE PARADE" OR "HITLERS YOUTH" AND BY PERMITTING HEARSAY ANSWER TO INTERROGATORIES TO NON-PARTIES TO BE ADMITTED INTO EVIDENCE AGAINST PLAINTIFF, BUT PREVENTED PLAINTIFF FROM IMPEACHING A DEFENSE WITNESS WHO ANSWERED INTERROGATORIES UNDER OATH, AND AFTER THE JURY FOUND A VERDICT IN FAVOR OF PLAINTIFF, THE TRIAL COURT INTENTIONALLY REVIEWED ALL EVIDENCE IN FAVOR OF VERDICT LOSER TO JUSTIFY TAKING AWAY THE VERDICT FROM PLAINTIFF?

TABLE OF CONTENTS

	PAGE
Questions Presented for Review...	i
Table of Contents.....	ii
Table of Citations.....	iii
Opinions Below.....	2
Federal Provisions Involved.....	2
Statement of the Case.....	3
Reasons Relied Upon For Allowance of the Writ.....	32
Argument.....	33
Conclusion.....	49
Order of U.S. District Court Eastern District of Penna.....	1a
Judgment Order, U.S. Court of Appeals, Third Circuit.....	24a
Order of U.S. Court of Appeals Third Circuit denying Rehearing..	25a

TABLE OF CITATIONS

PAGE

Globe Liquor Co. v. San Roman, 332 U.S. 571 (1948)..... 33

Henderson v. City of Mexico, 797 F.2d 320, 323 (8th Cir, 1986)..... 37

Johnson v. New York,N.H. and H.R. Co., 344 U.S. 48, (1952) 33

Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 232 (4th Cir, 1982)..... 38

National Screw & Mfg. Co. v. Voi-Shan Industries, 347 F.2d (9th Cir, 1965)..... 45

Lytle v. Household Mfg. Co. Inc., 494 U.S. 545 (1990)... 32,34

Neely v. Eby Construction Co., 386 U.S. 317 (1967)..... 33

NO. _____

IN THE
SUPREME COURT OF THE UNTIED STATES

LEONARD KUCINSKI,
Petitioner

Versus

MORNING CALL, INC.,
Respondent

Petition For a Writ of Certiorari To The United States Court of Appeals For The Third Circuit

---

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Leonard Kucinski, prays that a Writ of Certiorari issue to review judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order of the United States District Court for the Eastern District of

Pennsylvania was rendered on February 22, 1994, is recorded at ___F.Supp. ___, 1994 WL 66698, 145 L.R.R.M., BNA 2870 (E.D. Pa, 1994) and appears at page 1a of the Appendix herein.

The Order affirming the trial court was dated July 28, 1994 and reconsideration was denied on August 30, 1994, and are attached hereto at Pages 24a and 25a herein. The Petition For Writ of Certiorari is timely filed within 90 days thereof. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1), and Rule 17 of this Court.

FEDERAL PROVISIONS

The Seventh Amendment to the United States Constitution, §301 of the Labor Management Relations Act, 29 U.S.C. 29 U.S.C. §185; and the Age Discrimination Act, U.S.C. §621.

STATEMENT OF THE CASE

The Plaintiff, a reporter with 23

years longevity with his employer, filed a Complaint against his employer, Morning Call, Inc. after termination: 1) breach of contract claim under §301 of LMRA, 29 U.S.C. §185; and 2) termination in violation of the Age Discrimination Act, 29 U.S.C. §621.

After an eight day trial, the jury found in favor of the employer on the age discrimination claim, but explicitly found no good cause for terminating the employment in breach of the collective bargaining agreement, and awarded Plaintiff $100,000.00 for back pay only.[1]

The employer filed two post trial motions, namely, a motion for judgment as a

---

1.The collective bargaining agreement did not provide for a grievance arbitration hearing. Hence, Plaintiff had a cause of action against the employer under Section 301 of the LMRA, 29 U.S.C. §185. Plaintiff specifically did not seek "front pay", and after verdict, filed a Motion For Reinstatement to his position which was never addressed on the merits by the Court.

matter of law under Rule 50(b) of F.R.C.P., and an untimely Motion under Rule 60(b)(6). Plaintiff filed a motion for new trial on the age claim only.

On August 16, 1993, the trial court entered an Order denying Plaintiff's Motion For New Trial on the age claim. On January 4, 1994, the trial court granted the employer's motion for judgment as a matter of law claiming that the **"...essential facts are not in dispute..."**, setting aside the verdict of $100,000.00 and entering judgment in favor of the Defendant.

On July 28, 1994, the United States Court of Appeals, Third Circuit specifically accepted the outrageous assertion that "...essential facts are not in dispute..." and specifically adopted the opinion of the lower court. On August 30, 1994, the United States Court of Appeals, Third Circuit denied reconsideration. This Petition For Writ of Certiorari follows.

STATEMENT OF FACTS

There were two versions of the facts offered at trial. Plaintiff claimed that his supervisor, David Erdman, wanted him fired. As part and parcel of the effort by Erdman to fire Plaintiff, Erdman wrote up a disciplinary notice that falsely claimed that Plaintiff missed a deadline on an important story. When Erdman was approached by Plaintiff, the disciplinary notice was already written up. Plaintiff immediately requested the presence of a union representative at the time of receiving the disciplinary notice. A union representative was not available. Unbeknownst to Plaintiff, Erdman then falsely reported back to management that Plaintiff threatened him. Based upon the false claim of a missed deadline, and the false claim of a threat, the employer fired Plaintiff within 3 days before a union representative was available to review the situation

with management.

The defense had an opposing version. The defense claimed that Plaintiff did threaten Erdman--that Plaintiff intentionally refused to accept the written disciplinary notice without justification, that Plaintiff had actual knowledge of a 48 hour notice to bring in a union representative, and that Plaintiff failed to schedule a disciplinary meeting within 48 hour deadline even though his union representative, Ron Devlin, was available in that time period. The employer contended further that this incident with Erdman was part and parcel of a continuing pattern, namely, his prior supervisor, Paul Reinhard, disciplined him for rude and harassing behavior--that Plaintiff often refused to cover an assignment--and that Plaintiff had more disciplinary warnings for his conduct than any other employee.

The defense attempted to characterize

Plaintiff as a lazy and indolent employee who never complained about his lowly beat assignment, and that he failed to pursue "enterprise" stories. In addition, the employer claimed that another editor, Diane Stanczak was abused by the Plaintiff.

After hearing both versions, the jury found as follows:

> **"5. Do you find that the Defendant did not have good and reasonable cause to terminate the Plaintiff's employment? ANSWER: YES.**
>
> *** * ***
>
> **6. State in dollars the amount of damages Plaintiff sustained as a result of being terminated without good and reasonable cause. ANSWER: $100,000.00."**

In setting aside this verdict, the trial court specifically viewed the facts in a light most favorable to the **"verdict loser"** and intentionally, arbitrarily and capriciously ignored evidence from the employer's own management staff which exposed the falsehood of Erdman's claims.

After an 8 day trial entailing 9 witnesses for Plaintiff and 4 for

Defendant, the jury found that the Morning Call terminated Plaintiff, a 24 year employee, without "good and reasonable cause" and awarded Plaintiff a verdict based upon the trial court's limiting instruction to "back pay" only, for $100,000.00.

During the course of the trial, the Defendant received the benefit of every evidentiary ruling including the exclusion of testimony from two older reporters that the newsroom staff under David Erdman was referred to as "the Kiddie Parade" or "Hitler's youth". In addition, the trial court permitted the defense to use hearsay answers to interrogatories of non-parties, but prevented Plaintiff from impeaching Tom Martin, the Personnel Director, by his answers under oath, to interrogatories. Furthermore, the trial court further immunized Tom Martin from impeachment by holding that Tom Martin could not be impeached by

his prior inconsistent testimony at Plaintiff's unemployment compensation hearing. Given these evidentiary rulings, the Defendant prevailed on Plaintiff's age claim. The Plaintiff, however, won the verdict on breach of contract claim under Section 301 of the Labor Management Relations Act.

At trial, the Defendant prevailed on all evidentiary rulings and request for instructions to jury. Hence, the only challenge left after the adverse verdict was that the verdict should be set aside. The trial court granted the motion notwithstanding the verdict, rendered moot the Plaintiff's motion for reinstatement, and accepted the employer's version of hotly contested facts:

> **"The essential facts are not in dispute.**
>
> *** * ***
>
> **It is clear that Plaintiff was terminated because he used threatening language towards David Erdman, failed to accept written warnings and failed to schedule a disciplinary meeting even though Ron Devlin, his union representative, was**

available."
Opinion of Huyett, J.

Three members of the Third Circuit affirmed. **"...essentially for the reasons set forth in the Memorandum Opinion."** Judgment Order dated July 28, 1994. This was the defense's version of the facts. It cannot be reconciled with viewing the facts in a light most favorable to the verdict winner. Each and every claim by the Court of **"undisputed facts"** is contrary to the reality of the record. Plaintiff won collective bargaining claim. This Honorable Court must not permit a jury verdict to be set aside using the blatantly unconstitutional standard of facts viewed in a light most favorable to the verdict loser.

Plaintiff was fired for two stated reasons, namely, threatening Erdman and refusing to set up a meeting with a union representative within 48 hours:

> "Q. Mr. Erdman, can you tell us in your own words why Mr. Kucinski was terminated?

A. ...there were threats which occurred after warnings and also the refusal to meet after two days of attempting to set up a meeting with the union representative."
(Tr.Tr, **Erdman**, Vol. III, 185a-186a of Appendix)

As will be demonstrated herein, the jury found that Plaintiff was terminated unjustly without good and reasonable cause because Plaintiff never **threatened Erdman, and Plaintiff was told by the Personnel Director, Tom Martin, that he should wait both to accept the disciplinary warning and to schedule a disciplinary meeting after Ron Devlin or Stan Schaeffer returned from vacation.** That record evidence was intentionally ignored by the Trial Court and the three judge panel of the Third Circuit.

THREATS TO ERDMAN

"Q. This second document (D-27, 1033a) which attributes to you certain profanities and threats?
A. Yes.
Q. Did you say what they claimed you said?
A. No, I did not."
(Tr.Tr. **Kucinski**, Vol VIII, 602a of Appendix)

"A. ...And in the threat, this is when David Erdman said I used certain language and threatened him...it was just denied that I did such a thing."
(Tr.Tr. **Kucinski**, Vol VIII, 596a of Appendix)

See also, the initial disciplinary report denominated "D-26" which was prepared and signed by David Erdman on May 1, 1990, or one day after the purported "threat" and does not contain any claim by Erdman about a threat. (Vol. XIII, 1031a-1032a of Appendix). This was not simply a case of Plaintiff's word versus Erdman's word. According to Erdman, the threats were made to him in a full newsroom, but he could not identify a single witness to the threat:

"A. ...The newsroom was full, but I didn't look around. I left the area.
* * *
A. ...Again, I did not look around or speak to anybody in the area."
(Tr.Tr. **Erdman**, Vol II, 155a of Appendix)

More damaging to Erdman's credibility, however, was that he testified that the threats in the newsroom were so vicious that he called the police to report them.

Despite the viciousness of the attacks, Erdman conceded that in his two post firing encounters alone on the street with Plaintiff, Erdman initiated the contact and the Plaintiff was cordial:

> "A. I may have approached him...I went over to the vehicle...I believe he rolled down the window...
>
> * * *
>
> Q. And he was cordial and calm then, correct?
> A. Sure, I'd call it that.
>
> * * *
>
> Q. And that was also a very cordial discussion?
> A. Yes.
> Q. And this was after--this is after you fired him, correct?
> A. That's correct.
> Q. There were no threats, no physical violence?
> A. No."
> (Tr.Tr. Erdman, Vol III, 187a-188a of Appendix).

In other words, unlike the trial judge who determined as a fact that "...**Plaintiff was terminated because he used threatening language towards David Erdman....**" (Opinion herein), the jury believed Plaintiff and found that there was no threat because Plaintiff so testified. (Vol. VIII

596a,602a of Appendix). Erdman's own initial report signed after the threat did not claim that there was a threat (D-26, Vol XIII, 1031a-1032a of Appendix), no one heard any threat in a full newsroom (Vol II, 155a of Appendix), and Erdman's own testimony of Kucinski's subsequent street contact with Erdman after the firing was inconsistent with a threatening Kucinski. (Vol III, 187a,188a of Appendix).

REQUESTING THE DISCIPLINARY PAPERS BE GIVEN WITH UNION REPRESENTATIVE PRESENT

The trial court found as a fact that Plaintiff "...**failed to accept written warnings...**" (Opinion herein). That finding is contrary to the evidence viewed in a light most favorable to Plaintiff. The record establishes that Plaintiff wanted a union representative, or even the Personnel Director, Tom Martin, present at the initiation of the discipline, and that Tom Martin told him that he should use a union representative:

"A. ..[Erdman] said he would like to go into a room and talk to me about this. And I says--I told him before, I says David, I'm not going to be alone with you because I don't trust you...you said I used language I didn't use...So I'm not going to accept this or go and have a conference with you without a union representative..."
(Tr. Tr. **Kucinski** Vol. VIII, 582a-583a of Appendix).

"A Well, I told Tom [Martin, the Personnel Director], I said I really want a witness to this because of the last encounter [**October, 1989**] where David said all these things about me that weren't true...I said I would even take you as a witness, just to have a witness there to hand the...paper to me. And I just said..if you would do it, I would be...perfectly willing to do that.
Q. How did Mr. Martin respond to that?
A. Well, he said..I didn't think there is anything wrong with waiting...until Stan [Schaeffer, shop steward] or Ron [Devlin, the union president] got back to work to accept the notice.
Q. Did you accept his advice?
A. Yes, I did."
(Tr Tr. **Kucinski**, Vol. VII 586a of Appendix).

Not only did Plaintiff so testify but Tom Martin essentially corroborated Plaintiff's claims:

"Q. ...in the final sequence of events, the April 30th, May 1st, May 2nd sequence, were you involved in that sequence of events?
A. I was involved in part of that sequence, yes.
Q. At what point did you become involved?
A. ...Mr. Kucinski came into my office and spoke to me about the incident **that was taking place.**

* * *

A. I said he has a right to union representation..."
(Tr.Tr. **Martin**, Vol. III, 221a 222a of Appendix).

The trial court ignored the testimony of the employer's own personnel manager who told Plaintiff to use a union representative. Even David Erdman agreed that Plaintiff had a right to a union representative at the point that the disciplinary warning was being initially handed to Plaintiff:

"Q. ...so did you understand that, since you were initiating this as a disciplinary matter, he had a right to have a union person there?
A. Sure."
(Tr.Tr. **Erdman**, Vol II, 151a of Appendix).

In other words, the trial court made a factual determination contrary to Plain-

tiff's testimony as corroborated by both the personnel manager and David Erdman.

In simple terms, the trial court made a crucial factual determination that is opposite of the evidence,namely, the trial court found that Plaintiff "...**failed to accept written warnings**..." (Opinion herein). **There is no evidence of a refusal.** The evidence was that Plaintiff was exercising his right to have a union representative present at the time the disciplinary papers were handed to him, and this is exactly the procedure the Personnel Director instructed him to follow, namely, get a union representative there instead of using the Personnel Director as a witness. (Vol. VIII, 586a of Appendix).

FAILURE TO SCHEDULE
DISCIPLINARY MEETING WITHIN 48 HOURS

"Q. Are you aware of any person who was discipline because a union representative didn't come in within 24 hours?
A. I can't remember, no, I'm not aware of any."
(Tr.Tr., **Hymans**, Ex. Editor,

325a of Appendix).

The trial court found that the Defendant was justified in terminating Plaintiff because Kucinski "...**failed to schedule a disciplinary meeting even though Ron Devlin, his union representative, was available.**" Opinion herein. Again, that is contrary to the evidence viewed most favorably to the verdict winner. First, Ron Devlin was on vacation and not readily available:

> "Q. ...Ron Devlin was not available? He wasn't on the premises, correct?
> A. Well, he was at his home. He was not on the premises, definitely not."
> (Tr.Tr. **Erdman** Vol. II, 163a of Appendix).

> "A. --but I [Ron Devlin] was on vacation.
> * * *
> Q. And that was a scheduled vacation?
> A. Yes.
> Q. What about Stan Schaeffer?
> * * *
> A. I was on vacation. Stan Schaeffer was out sick...
> * * *
> Q. Do you have a telephone at home?
> A. Yes, I do.
> Q. Is you phone listed or unlisted?
> A. It's unlisted."
> (Tr.Tr. **Devlin**, Vol. V, 413a

of Appendix).

Again, Plaintiff's testimony that Ron Devlin was not available was corroborated by Erdman and Ron Devlin, himself. Hence, the trial court again made a finding of fact which is viewed in a light most favorable to the **verdict loser**!

NO NOTICE TO KUCINSKI OF 48 HOUR DEADLINE

Despite the claim by the trial court to the contrary, Plaintiff was not advised that he had a 48 hour deadline for scheduling the meeting, and the Personnel Director, Tom Martin, **explicitly** told Plaintiff that he could await the return of Devlin or Schaeffer to schedule the disciplinary hearing:

> "Q. You knew you needed union representation when you came back to work the next day, didn't you?
> A. On Tuesday?
> Q. Yes.
> A. **No, I did not know I needed union representation when I came back to work on Tuesday.**
> (Tr.Tr. **Kucinski** Vol. IX, 693a of Appendix).

"A. **No, I did not know I needed a union representative when I came to work on Tuesday.**"
(Tr.Tr. **Kucinski** Vol. IX, 694a of Appendix)

"A. ...But he [Tom Martin Personnel Director] told me I would not have to accept the disciplinary--he said he saw no reason not to wait--you know, wait till they [Devlin or Schaeffer] get back to accept the disciplinary notice so they could be there."
(Tr.Tr. **Kucinski** Vol. IX, 699a of Appendix).

Q. Now what did you tell Dave Erdman that Tom Martin had said?
A. I told Dave Erdman that Tom Martin said it would be okay to wait until either Ron Devlin or Stan Schaeffer came back."
(Tr.Tr. **Kucinski** Vol. IX, 712a).

The trial court's claim that termination was justified because "...**Plaintiff failed to schedule a disciplinary meeting even though Ron Devlin, his union representative, was available...**" (Opinion herein), is inconsistent with the facts viewed most favorable to the verdict winner. Ron Devlin was on a scheduled vacation, at home, with an unlisted telephone number. Erdman confirmed his absence from the

premises. Plaintiff checked with the Personnel Director and was explicitly advised that he could wait for either Devlin or Schaeffer to come back to work before accepting the disciplinary notice. Plaintiff followed that instruction, and was never told that there was a 48 hour deadline. There is no conceivable way this evidence viewed most favorably to the verdict winner can be turned into a willful refusal to schedule a disciplinary hearing.

In its 12 page opinion, the trial court made repeated "factual determinations" which are contrary to the record viewed most favorably to the verdict winner. Here are nine of them:

Fact Error No. 1:

TRIAL COURT: **"...received a verbal warning from his supervisor, Mr. Reinhard, because of his rude and harassing behavior towards a co-worker."** (Opinion)

CONTRA:

> "A. I [Reinhard] never had a problem with Len. We were cordial with one another...

* * *

Q. Did he ever threaten you?
A. No, he did not.
Q. Did he ever abuse you?
A. No, he did not.
Q. Did he ever threaten or abuse any of your staff?
A. No, he did not."
(Tr.Tr. **Reinhard**, Vol. VI 481a-482a of Appendix).

Prior to coming under Erdman's supervision, Plaintiff had two long-time supervisors, Paul Reinhard and James Kelly. Both Reinhard and Kelly appeared as witnesses for the Plaintiff and expressly testified on his behalf. It is inconceivable that the trial and appellate courts could read this testimony in light most favorable to the verdict winner and decide that Reinhard had a problem with Plaintiff.

Fact Error No. 2:

TRIAL COURT: "...**refusing and failing to cover an assignment.**" (Opinion)

CONTRA:

"Q. And there was a complaint that you hadn't done an assignment...
A. No, that's not true...I did complete the assignment."
(Tr.Tr. **Kucinski**, 652a of Appendix).

Q. During what period of time were you his immediate supervisor?
A. From the time I became sports editor until the time he was transferred from sports to news...

* * *

Q. Did he ever miss an assignment?
A. No, he did not."
(Tr.Tr. **Reinhard**, Sports Editor, Vol VI, 475a-477a of Appendix).

"Q. Did [Kucinski] have any area of responsibility of working for you?
A. He wrote the Road test which appeared in my section.

* * *

Q. Did he ever miss a deadline?
A. No."
(Tr.Tr. **Kelly, Features Editor**, Vol. VI 486a-487a of Appendix).

"Q. Do you recall [Kucinski] ever refusing any assignment that anybody gave him?
A. Not offhand, no, sir."
(Tr.Tr. **Tobias, Day City Editor**, Vol. VI, 507a of Appendix).

Again, the trial court read the record the way that the verdict loser wanted it read, and not in light of the reality that three supervisors explicitly testified that Plaintiff never missed an assignment.

Fact Error No. 3:

TRIAL COURT: **"...multiple complaints from citizens in the community and fellow employees regarding Plaintiff's abusive behavior."** (Opinion).

CONTRA:

"Q. Did he ever abuse you?
A. No, he did not.
Q. Did he ever threaten or abuse any of your staff?
A. No, he did not."
(Tr.Tr. **Reinhard, Sports Editor**, Vol. VI 481a-482a of Appendix)

"A. [Kucinski] wrote the Road Test which appeared in one of my sections.
Q. How would you characterize your relationship with Leonard Kucinski?
A. Professional.

* * *

Q. Did he ever abuse you?
A. No.
Q. Did he ever threaten you?
A. No.
Q. Did he ever abuse or threaten any of your staff?
A. Not that I know of.
(Tr.Tr. **Kelly, Features Editor**, Vol. VI 486a-492a of Appendix).

Q. I said was [Kucinski] personally abusive to you, right. And what was your answer.
A. I think I said no.

* * *

Q. Then I asked you, did you ever see him act personally abusive to anyone during that period of time when you were the days editor, what did you say?
A. I believe, I said no."
(Tr.Tr. **Tobias, Day City Editor**, Vol. VI 510a of Appendix).

The employer wanted the jury to believe that Plaintiff had a long history of abus-

ing people to bolster the claim by Erdman that Plaintiff threatened him. Again, his two long-time supervisors, and his new day-time supervisor testified to the opposite.

Fact Error no. 4:

TRIAL COURT: **"...more disciplinary warnings from his conduct than any of Defendant's other employees."** (Opinion).

Larry Hymans, Ex. Editor, testified about serious errors of other reporters, and the consequences:

CONTRA:

> "A. ...My inviolate rule in the newsroom is no reporter uses a source, an unnamed source unless either the managing editor or myself explicitly [approves].
>
> * * *
>
> A. ...He [Reporter A] wrote a story, didn't notify us, passed it through the desk, it got into the paper and he was disciplined for it.
>
> * * *
>
> A. He was given a written warning."
> (Tr.Tr. **Hymans**, Vol. IV, 270a 271a of Appendix).
>
> "A. ...he's the one who wrote an inaccurate story [Reporter B] and did not take a photograph that he was supposed to get...
>
> * * *
>
> A. ...he received a disciplinary

notice.

* * *

A. A written reprimand."
(Tr.Tr., **Hymans**, Vol. IV
273a of Appendix)

Again, the employer wanted the jury to believe that Plaintiff was the worst employee in its newsroom. The evidence did not support that claim.

Fact Error No. 5:

TRIAL COURT: "Plaintiff had never requested a specific beat nor did he complain to management when he received his beat assignment. (Opinion).

CONTRA:

"...he [Kucinski] sat down and I asked him what his problem was. And he said he--the decision was made to transfer him to the news side and he would like to appeal that process through me."
(Tr.Tr. **Hymans**, Vol. III
243a of Appendix).

"Q. Now, at any point in time after his assignment, did Mr. Kucinski approach you [David Erdman], about doing an environmental beat.
A. Yes, sir."
(Tr.Tr. **Erdman**, Vol II 116a of
Appendix).

Here, the trial court contradicted the de-

fense witnesses who testified that Plaintiff wanted an environmental beat, and that he appealed directly to the Executive Editor about his assignment to Erdman. In other words, the trial court was creating "facts" which were contrary to the testimony of even the defense witnesses.

Fact Error No. 6:

TRIAL COURT: **"...failed to pursue any 'enterprise' stories..."** (Opinion).

CONTRA:

> "Q. Have you ever written enterprise stories?
> A. That's all I wrote, before I was transferred to the news side...
> * * *
> Q. After you were reassigned to Mr. Erdman's supervisor, did you attempt to write any enterprise stories?
> A. Yes, I asked to write different--various type of enterprise stories.
> * * *
> Q. Did you pursue any specific leads for enterprise stories?
> A. Yes, I had one that I considered as a very important story. From a health point and the timeliness of it. And that was salmon from Lake Ontario that contained PCB's...
> * * *
> Q. And what was Mr. Erdman's response?
> A...I had one day to do some work on

it and that was it."
(Tr.Tr. **Kucinski**, Vol VIII 606a 607a, 610a of Appendix).

Again, the facts read in a light most favorable to the verdict winner are inconsistent with the trial judge's factual determination.

Fact Error No. 7:

TRIAL COURT: **"...was abusive and confrontational towards Ms. Stanczak, the Assistant City Editor."** (Opinion) and **"...Plaintiff cursed Mrs. Stanczak...calling her 'stupid' and repeatedly waved a scissors and ruler at her."** (Opinion).

CONTRA:

"A. I have never threatened Mrs. Stanczak with scissors or anything else."
(Tr. Tr. **Kucinski**, Vol. II 849a of Appendix).

Stanczak claimed that Plaintiff abused her. Plaintiff denied her claim. The jury believed Plaintiff and not Stanczak.

Fact Error No. 8:

TRIAL COURT: **"In October of 1989, ...instigating an altercation and used abusive and threatening language shouting at Mr. Erdman."** (Opinion).

CONTRA:

"Q. Would that have been the period between October, roughly October of '89?
A. That's -- that's correct.
* * *
Q. And Mr. Kucinski gave a point-by-point rebuttal of those claims, did he not?
A. He did give a rebuttal..."
(Tr.Tr. **Martin**, Vol. III
221a of Appendix).

"A. that is in response to the October incident.
Q. And Mr. Kucinski said 'It's a lie', correct? Do you remember him saying that?
* * *
A. He did say that several of the things were a lie..."
(Tr.Tr. **Martin**, Vol. III
231a of Appendix).

"Q. Did you say that [in October of 1989]?
A. No, I did not say that.
Q. And did you write a rebuttal to that?
A. Yes.
Q. and what did you specifically write...?
A. I said this is not true in any manner..."
(Tr.Tr. **Kucinski**, Vol. VII
566a of Appendix).

Erdman testified about the incidents of abuse. Plaintiff offered corroborative evidence from the Personnel Director that the abuse did not occur. The jury believed

Plaintiff and not Erdman.

Fact Error No. 9:

TRIAL COURT: **"Mr. Tobias then directed Plaintiff to submit an advance story concerning the Lower Milford planning board meeting for publication in the April 30 paper."** (Opinion).

CONTRA:

> "Q. Was that story supposed to be keyed in to the Tim Reeves [expose] story?
> A. No, sir. I, [Jack Tobias] had no knowledge of the Tim Reeves story.
> Q. Did you give Mr. Kucinski a deadline to perform that story, the Lower Milford development story?
> A...I used the expression tentative loose deadline. There was nothing etched in stone...
> Q. **And the Monday deadline was not important to you as a tie-in to the Sunday Don Snyder story because you did not know that the Don Snyder story was coming.:**
> A. **Yes."**
> (Tr.Tr, **Tobias**, Vol. VII
> 512a of Appendix).

> "Q. At any point during that week of April 22nd, 1990, did Mr. Tobias say anything to you about writing an advance story?
> A. No."
> (Tr.Tr. **Kucinski** Vol. VII
> 574a of Appendix).

Here, the trial court ignored the clear and explicit testimony of both Tobias and

Plaintiff that the Lower Milford Story was not deadlined for the April 30 paper, and the trial court again created a fiction which was no longer claimed by the employer.

The trial court justified the termination of Plaintiff for: 1) uttering a threat which he did not make; and then 2) for failing to schedule a disciplinary hearing within 48 hours when Plaintiff did not know of such a deadline and where Plaintiff was **explicitly** told by the Personnel Director that he could wait until Ron Devlin, the union president, returned from vacation. In order to justify this logic, the trial court made nine other specific observations which are directly contradicted by the record read in a light viewed most favorably to the verdict winner. The Court of Appeals specifically adopted the lower court's erroneous factual presentation. Hence, Plaintiff's right to a jury trial

was denied because the trial court and appellate courts both read the record in a light most favorable to the verdict loser.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Review by certiorari is appropriate in the case at bar under Rule 17(1) (9) of the Rules of the United States Supreme Court in that a Federal Court of Appeals has rendered a decision in conflict with the binding authority by this Honorable Court,namely, the Seventh Amendment's guarantee to right to trial by jury requires that a verdict winner gets the benefit of all facts read in a light most favorable to the verdict winner. Compare, Lytle v. Household Mfg. Co., Inc., 494 U.S. 545 (1990).

ARGUMENT

I. WHETHER OR NOT THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENIED PLAINTIFF HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL BY VACATING THE JURY'S VERDICT OF $100,00.00 IN FAVOR OF pLAINTIFF UNDER THE TRIAL COURT'S BLATANTLY ERRONEOUS STANDARD THAT THE FACTS MUST BE VIEWED IN A

LIGHT MOST FAVORABLE TO THE "VERDICT LOSER" BECAUSE THE "VERDICT LOSER" WAS A NEWSPAPER/EMPLOYER?

1. Seventh Amendment demands that record be read in a light most favorable to jury winner. This Court has repeatedly held that the Seventh Amendment guarantees of a jury trial requires that a motion for judgment as a matter of law can only be granted under the standard of reading the record in a light most favorable to the verdict winner. See, Globe Liquor Co. v. San Roman, 332 U.S. 571, (1948); Johnson v. New York, N.H. and H.R. Co., 344 U.S. 48, (1952); Neely v. Eby Construction Co., 386 U.S. 317 (1967). Both the trial court and appellate court flagrantly violated this requirement. Plaintiff won the verdict based upon his testimony, corroborated by others, that he was a good and contentious employee for 23 years. He never missed a deadline. He never threatened anyone. Erdman's claim that Plaintiff missed a

deadline and then threatened him when he, Erdman, was attempting to discipline him for missing the deadline was **bogus** from start to finish.

2. This Court has scrupulously protected the right to a jury trial, by mandating that the record be read most favorabye to the verdict winner. In Lytle v. Household Mfg. Inc. 494 U.S. 545 (1990), this Court indicated that, even where an appellate court affirms on an unpublished opinion, this Court will prevent the dilution of an employee's right to a jury trial. After a nine day trial, Plaintiff won the verdict. The jury believed that Plaintiff's termination was without "good and reasonable cause". **Why?**

3. Two portraits of Kucinski. The jury heard two portraits of Kucinski, namely the hot headed employee who missed important deadlines, and cursed and screamed at co-employees and supervisors.

That was the official line. Then, there was the other portrait painted by Plaintiff's former long-time supervisors. Leonard **never** missed a deadline; **never** cursed; **never** threatened nor abused anyone. The jury believed this alternate portrait.

4. Why did the jury accept this alternate portrait? The reality is that senior management types--including two long-time supervisors of Plaintiff--came in and testified for Plaintiff. That is why the Plaintiff won. That is the record the trial court and appellate court intentionally ignored.

5. Absurdity by the trial court. the trial court starts from an "absurd premise", namely, **"essential facts are not in dispute..."** (Opinion herein). That statement is not fair, nor intellectually honest. All facts offered by Erdman were in dispute, starting with the October, 1989 discipline, missing the deadline for the

story to run May 1, 1990, the threat to Erdman, and the "purported" notice to bring in a union representative within 48 hours.

Throughout the trial, it was obvious that the trial court was hostile to his claim, though the reasons for the hostility were unknown. Hence, it was not unexpected that the trial court deviated from the reality of the record, and wrote an opinion about a "Leonard Kucinski" that existed only in the minds of Erdman/Stanczak. The disturbing fact, however, is how could such an obviously unfair and prejudicial characterization depicted only by the defense prevail before three esteemed members of an appellate court. The effect of reading the record in light most favorable to the **verdict loser** was to violate Plaintiff's constitutional right to a fair trial.

II. WHETHER OR NOT THE TRIAL COURT INDICATED A BLATANT BIAS AGAINST PLAINTIFF BY EXCLUDING TESTIMONY ON THE AGE CLAIM THAT THE NEWSROOM STAFF WAS REFERRED TO AS "THE KIDDIE PARADE" OR "HITLERS YOUTH" AND BY PERMITTING HEARSAY ANSWER TO INTERROGATO-

RIES TO NON-PARTIES TO BE ADMITTED INTO EVIDENCE AGAINST PLAINTIFF, BUT PREVENTED PLAINTIFF FROM IMPEACHING A DEFENSE WITNESS WHO ANSWERED INTERROGATORIES UNDER OATH, AND AFTER THE JURY FOUND A VERDICT IN FAVOR OF PLAINTIFF, THE TRIAL COURT INTENTIONALLY REVIEWED ALL EVIDENCE IN FAVOR OF VERDICT LOSER TO JUSTIFY TAKING AWAY THE VERDICT FROM PLAINTIFF?

1. The trial court improperly quashed the subpoenas issued to Walt Roland and Dick Cowen who were prepared to testify, about the newsroom staff being labeled as "the Kiddie Parade" or "Hitler's Youth". Vol. I, 45a-55a of Appendix.

The indirect evidence by which Plaintiff could bear his burden of persuasion may consist of "evidence that [older employes] were treated less favorably than comparably situated [younger] employees." Henderson v. City of Mexico, 797 F.2d 320, 323 (8th Cir, 1986). Also, Plaintiff could use this testimony as "evidence that the employer was engaged in a general youth movement in which appellant may have been one victim." Lovelace v. Sherwin-Williams

Co., 681 F.2d 230, 232 (4th Cir, 1982).

2. The trial court improperly refused the request to call Roland and Cowen after defense opened the the door by arguing that the Employer hired older persons.

A. During Larry Hyman's testimony, this corporate officer repeatedly stated how the Employer hired older employees. App. Vol. 3, 236a; Vol. 4, 294a of Appendix. On that basis, Plaintiff requested the trial court to reconsider its prior ruling excluding the testimony of Roland and Cowen. App. Vol. 4, 295a of Appendix.

B. The Roland testimony impeached Employer's claim that Employer hired older persons by showing that Roland worked for Erdman and was transferred out to a bureau after 20+ years of service. Then, Employer by-passed Roland for a promotion as bureau chief, and the Employer gave the job to a reporter under age 40.

In the instant case, there were three older (over 40) employees under Erdman's supervision: 1) Cowen; 2) Roland; and 3) Kucinski. Erdman transferred Roland out when Roland expressed an interest in a "promotion" to Bureau Chief in Lehighton. Erdman, however, did not give Roland this promotion--just the transfer.

Hence, the circumstances surrounding Roland's transfer out of the Allentown Bureau while being denied a promotion which was instead given to one of Erdman's "young blood" is relevant as part and parcel of a plan for Erdman to discriminate against older reporters, and relevant to attack the credibility of Erdman.

In pre-trial testimony, David Erdman attempted to indicate that Walter Roland, a reporter over 50, merely transferred out of the news side and up to a branch office. App. Vol. 14, 1170a of Appendix. According to Erdman, the Lehighton Bureau had a

vacancy where there was "...effectively a lot of young blood but not some senior people." App. Vol. 14, 1169a of Appendix. If you could believe Erdman, that is all there was to it: Roland, a senior reporter, transferred out to Lehighton because there was a young staff up there. Other editors, however, specifically contradicted Erdman's version of how Roland was transferred. App. Vol. 14, 1171a-1175a of Appendix.

Despite Roland's seniority, and Erdman's articulated specific need to get a senior person on the Lehighton bureau, the Morning Call transferred Roland out of the news department sent him up to Lehighton as a general reporter, and assigned a new bureau chief, a person Erdman labeled as "young blood", namely Bob Orenstein, as bureau chief. App. Vol. 14, 1171a-1175a of Appendix.

David Erdman attempted to characterize the Roland transfer as voluntary. Al

Roberts specifically contradicted him: "I hesitate to say it was voluntary." App. Vol. 14, 1173a of Appendix.

Walt Roland wanted to transfer to the Lehighton bureau as the Bureau Chief. Instead, Erdman used this articulated interest in a promotion to Lehighton as an excuse to transfer the senior reporter out of the Allentown office. That left only Kucinski and Cowen as general assignment reporters over 40 at the Allentown office of the Morning Call. Kucinski was then fired. This testimony is relevant to share a "pattern and practice", and also to impeach Erdman on his stated reason for transferring Roland. Hence, Defendant's motion in limine ought to have been denied. At very least, the trial court ought to have allowed Roland's testimony after Defendant opened the door by Hyman's testimony about favorable treatment of older employees.

C. **The Cowen testimony also would have impeached Defendant's claim, (via Hyman) by showing Erdman's threats to transfer Cowen (over 40) to night work after 20+ years of service based upon Cowen's age.** Hence, the trial court twice erred: by excluding Roland's and Cowen's testimony.

3. The trial court erred by permitting the Employer to introduce into evidence answers to interrogatories by non-parties who were otherwise available to testify and be cross-examined while excluding the Employer's verified answers to interrogatories which clearly impeached the testimony of several of the Employer's witnesses.

A. The trial court improperly permitted the Defendant to introduce into evidence answers to interrogatories by non-parties who were otherwise available to testify.

Prior to trial, Plaintiff sent Depositions Upon Written Questions Under Rule 31 of F.R.C.P. to several retired reporters to determine whether or not they elected retirement because of age discrimination. These questions--and answers--were given years before the trial. After it was accomplished, neither Plaintiff nor Defendant sought to take the depositions of any of these retired reporters. Furthermore, in the Final Pre-Trial Order, neither party identified any of the retired reporters as witnesses.

At time of trial, the Employer, over objection, read the answers of the non-parties into evidence under Rule 32(a) of the F.R.C.P. The employer relied solely upon rule 32(a)(3)(E) which provides as follows:

> "(E) **Upon application and notice**, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the witnesses **orally** in open court, to allow the

deposition to be read."

On its face, Rule 32(a) of F.R.C.P. relates solely to "...the witnesses were then present and testifying..." No court authority exists to apply Rule 32(a) to written interrogatories to non-parties under Rule 31. Hence, Rule 32(a) is wholly inapplicable to permitting answers to written interrogatories to be read as depositions.

Assuming, arguendo, that written interrogatories to non-parties may be read as "...witnesses were then present and testifying...", the Employer failed to elicit any foundation for the "exceptional circumstances" required under Rule 32(a)(3)(E). None of the retired reporters was dead. Rule 32(a)(3) (A). All were well within 100 miles of the Courthouse. Rule 32(a)(3)(B). None were unable to testify because of age, illness, infirmity, or imprisonment. Rule 32(a)(3)(C). None

were hiding from process servers. Rule 32(a)(3)(D). National Screw & Mfg. Co. v. Voi-Shan Indus tries, 347 F.2d (9th Cir, 1965); Hence, the trial court erred in allowing Defendant to read these non-party interrogatories.

B. The trial court erred in excluding from evidence the reading of Defendant's verified answers to interrogatories which identified the decision makers in Defendant's decision to terminate Plaintiff when said answers clearly impeached several witnesses and contradicted Defense claims.

Plaintiff called Tom Martin as of cross-examination wherein Martin indicated that he, personally, as personnel director, made the decision to terminate Plaintiff after consultation with the other editors. This version, however, was Martin's second version. In answers to interrogatories, Martin identified the persons who made the decision, namely only the "editors" as

decision-makers. Martin indicated that he only "implemented" the decision made by others.

Plaintiff attempted to read into evidence Martin's verified answers clearly impeached his sworn testimony. The court excluded this inconsistent verified statement in violation of Rule 801(d) of the Federal Rules of Evidence.

C. The trial court's ruling was contradictory: answers to interrogatories by non-party were admissible against Plaintiff as substantive evidence but verified answers by the Defense's own witnesses to interrogatories could not be used for impeachment. It is uncontradicted that the trial court issued numerous rulings against Plaintiff on his age case. The rulings on the age case reflected a bias by the trial court against the Plaintiff and in favor of the Employer.

Despite the adverse rulings, Plaintiff

prevailed upon the breach of contract claim while the employer prevailed on the age claim. In a final decision to determine the result, the trial court vacated the Plaintiff's verdict by ignoring the reality of the record before the court, and claiming that a hotly contested, fact intensive trial involved undisputed facts.

The Seventh Amendment guarantee of a jury trial is supposed to be real. A trial court, and an appellate court, does great disservice to the notion of a jury trial when the courts create a fictional reality as to what transpired before the jury.

The Seventh Amendment jury trial guarantee mandates that the verdict winner gets the benefit of the facts. The trial court, and the appellate court, turned that rule on its head. Both tribunals intentionally read the record in a light most favorable to the **verdict loser.** That result cannot be allowed to stand if the

constitutional guarantee of a jury trial is real. IF trial courts are permitted to ignore the evidence which clearly supported the jury verdict--IF the trial court can find that the Plaintiff missed a deadline when all of the witnesses, either grudgingly or enthusiastically, testified that Plaintiff never missed a deadline--IF the trial court can find that Plaintiff abused his supervisors when his two long-term supervisors explicitly testified that Plaintiff never abused anyone--then there is no need for juries. It is obviously simpler and less expensive to let trial judges sit as the trier of facts. That, however, is not what our Founding Fathers envisioned when they wrote the Seventh Amendment.

The jury heard the evidence. The jury found the facts as claimed by the Plaintiff. In order to get to the result that the trial court wanted, the trial

court intentionally ignored the facts as offered at trial, and viewed the facts as postulated by the defense.

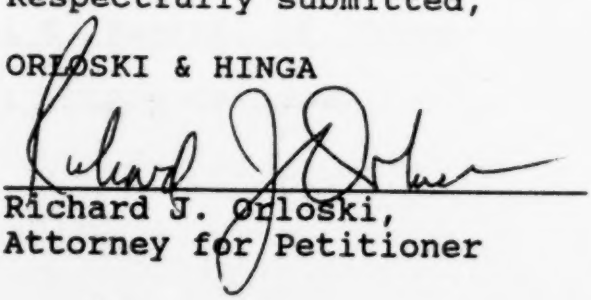
That decision cannot be allowed to stand without doing irreparable harm to the idea of the right to trial by jury. If trial courts can create fictional records as to what happened below--if appellate courts can affirm on the basis of a fictional record--then the idea of a right to trial by jury is wholly in jeopardy. Hence, this matter ought to be scheduled for full review by this Honorable Court.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari ought to be granted.

Respectfully submitted,

ORLOSKI & HINGA



Richard J. Orloski,
Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEONARD KUCINSKI Plaintiff	:	CIVIL ACTION
	:	NO. 90-4535
v.	:	
	:	
MORNING CALL, INC. Defendant	:	

O R D E R

HUYETT, J. **December 30, 1993**

Defendant, Morning Call, Inc. has moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b). The Motion is **GRANTED**. Judgment is entered in favor of Defendant, Morning Call, Inc. and against Plaintiff Leonard Kucinski. The Plaintiff's complaint is **DISMISSED** in its entirety.

IT IS SO ORDERED.

Daniel H. Huyett, 3d, Judge

ENTERED; 1/5/94, CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEONARD KUCINSKI Plaintiff	:	CIVIL ACTION
	:	NO. 90-4535
v.	:	
MORNING CALL, INC. Defendant	:	

MEMORANDUM

HUYETT, J. **February 22, 1994**

This Memorandum is issued pursuant to the Order of December 30, 1993, granting Defendant's motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) and dismissing plaintiff's complaint in its entirety.

Plaintiff Leonard Kucinski, following his discharge as a reporter for Defendant Morning Call, Inc. (Morning Call), brought this action against Defendant pursuant to the Age Discrimination in Employment Act (ADEA, 29 U.S.C. §§621-634 and Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. §185. Plaintiff claimed

that Defendant terminated him because of his age, in violation of the ADEA and without good and reasonable cause in violation of the collective bargaining agreement between Defendant and Lehigh Valley Newspaper Guild Local No. 49. Following a trial, the jury found in favor of Defendant on Plaintiff's age discrimination claim, but found against Defendant on Plaintiff's claim under the collective bargaining agreement and awarded Plaintiff $100,000) in damages.[1]

---

1. The jury answered interrogatories submitted to it as follows.

I. Age Discrimination

1. Do you find that Plaintiff Leonard Kucinski's age was a determining factor in Defendant Morning Call's decision to terminate Plaintiff?

YES ____ NO X

(If your answer to Interrogatory number 1 is "yes", please proceed to interrogatory number 2).

...Continued...

(If your answer to interrogatory number 1 is "no", you will be returning a verdict for Defendant on Plaintiff's age discrimination claim. Proceed to interrogatory number 5.

2. State, in dollars, the amount of damages Plaintiff has sustained as a result of age discrimination from the time of the discrimination until the present.
$_____
(Please proceed to interrogatory number 3).

3. Do you find that Defendant's violation of the Age Discrimination In Employment Act was willful?
YES _____ NO _____
(Please proceed to Interrogatory number 4).

4. State, in dollars, the sum that would fairly and justly compensate Plaintiff for the damages he would sustain in the future as a result of age discrimination, in the event that the Court finds that reinstatement is not feasible.
$_____
(Please proceed to interrogatory number 5).

II. Breach of Collective Bargaining Agreement

5. Do you find that Defendant did not have good and reasonable cause to terminate Plaintiff's employment?

YES X NO. _____
(If your answer to interrogatory number 5 is "yes" proceed to interrogatory number 6).
(If your answer to interrogatory number 5

Defendant Morning Call, in moving for judgment as a matter of law pursuant to Rule 50(b) on Plaintiff's breach of the collective bargaining agreement claim, also sought other relied pursuant to Rules 59(e) and 60(b)(6).[1]

...Continued...

is "no", you will be returning a verdict for Defendant on Plaintiff's breach of collective bargaining agreement claim. Stop, sign the form, and inform the deputy clerk).

6. State in dollars the amount of damages Plaintiff sustained as a result of being terminated without good and reasonable cause. (If you already awarded Plaintiff damages for age discrimination in interrogatory number 2, do not duplicate, in answering interrogatory number 6, any amount you awarded Plaintiff in answering interrogatory number 2).
$100,000.

2. Defendant moved under Rules 59(e) and 60(b) to set aside the judgment for Plaintiff and to enter judgment for Defendant. Defendant claim that Plaintiff had no right to bring his collective bargaining agreement claim without first alleging that plaintiff's union had breached its duty of

The Third Circuit recently stated that a motion for judgment as a matter of law may be granted "only if, viewing the evidence in the light most favorable to [the non-moving party] and giving [the non-moving party] the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury could reasonably find liability." Wittekamp v. Gulf Western, Inc. 991 F.2d 1137, 1141 (3d Cir. 1993), cert denied, 62 U.S.L.W. 3273 (U.S. Oct. 12, 1993). Judgment as a matter of law is appropriate only if considering the evidence and all reasonable inferences arising from the evidence in the light most favorable to the non-moving party, a ra-

---

...Continued...

fair representation. Defendant also claimed it should be granted judgment as a matter of law on Plaintiff's failure to mitigate his damages. The Court need not consider these contentions because of the disposition of Defendant's Rule 50(b)

tional jury could not have found in favor of that party. Bhaya v. Westinghouse Electric Corp., 832 F.2d 258, 259 (3d Cir. 1987), cert denied, 488 U.S. 1004 (1989); Aloe Coal Co. v. Clark Equipment Co., 816 F.2d 110, 113 (3d Cir. 1987), cert denied, 484 U.S. 853 (1987). Keeping this standard and the nature of proof required to prove a breach of the collective bargaining agreement in mind, the trial evidence must be evaluated to determine whether plaintiff was terminated without good and reasonable cause in violation of the collective bargaining agreement.[1]

...Continued...

motion.

3. The Collective Bargaining Agreement between the Lehigh Valley Newspaper Guild and Defendant Morning Call prohibited Defendant Morning Call from terminating employees except for good and reasonable cause.
This means a real cause or basis for dismissal. A discharge is for good and

FACTS

The essential facts are not in dispute. Plaintiff was employed as a general assignment reporter for Defendant Morning Call on June 19, 1966. After a brief period, Plaintiff was transferred to the Sunday paper where he wrote feature stories. Plaintiff continued o the Sunday paper for approximately ten years. In 1977, Plaintiff was transferred back to the news division where he covered citywide news stories. This transfer required Plaintiff to switch from the day shift to the night shift.

...Continued...

reasonable cause if it is not arbitrary or capricious or unjustified. Just cause, which is the same as good and reasonable cause, is some cause or ground that a reasonable employer, acting in god faith in similar circumstances, would regard as a good and sufficient basis for terminating the services of an employee. See Weir v. Anaconda Co., 773 F.2d 1073, 1080 (10th Cir. 1985), Teamsters Local No. 273 v. CSX

Approximately one year after this change, in 1978, Plaintiff requested and received a transfer. Plaintiff then began to write columns on various subjects, including automobiles, fishing, farming and the outdoors. Plaintiff's supervisor at this time was Paul Reinhard, the Sports Editor. Plaintiff remained in this position for approximately ten years, when he also wrote occasional feature or news stories. Plaintiff's responsibilities changed over these ten years and by 1978 Plaintiff was writing only two automobile columns and a fishing column.

While writing columns, Plaintiff received a verbal warning from his supervisor, Mr. Reinhard, because of his rude and harassing behavior towards a co-worker. At this time, Plaintiff also received two written warning notices for acting rudely on the telephone. Plaintiff

---

...Continued...

received another warning notice for refusing and failing to cover an assignment. In addition, Plaintiff was cited on a number of other occasions for his harassing behavior towards fellow employees. Plaintiff's improper conduct resulted in Defendant receiving multiple complaints from citizens i the community and fellow employees regarding Plaintiff's abusive behavior. Plaintiff accumulated more disciplinary warnings for his conduct than any of Defendant's other employees.

In May, 1989, Plaintiff was transferred to the City Desk where he worked as a general assignment reporter assigned to a particular beat. Plaintiff did not lose any compensation or benefits as a result of his transfer to the City Desk. Plaintiff's new superiors at the news division's City Desk were David Erdman, the City Editor,

---

...Continued...

and Diane Stanczak, the Assistant City Editor. Upon Plaintiff's arrival at the City Desk in May, 1989, Mr. Erdman and Ms. Stanczak met with Plaintiff to explain the procedures and operations of the City Desk. Plaintiff was informed of his responsibility for filing a weekly "budget", detailing the assignments he would be working on in the upcoming week. Plaintiff's responsibilities included assigned stories as well as "enterprise" stories that Plaintiff would originate himself. Plaintiff's beat was the Southern Lehigh School District. This involved reporting on the various townships and municipalities in the area. Plaintiff had never requested a specific beat nor did he complain to management when he received his beat assignment.

During the summer of 1989, Mr. Erdman informed Plaintiff his performance was

---

...Continued...

unsatisfactory because Plaintiff submitted untimely and incomplete budgets, failed to pursue any "enterprise" stories and was abusive and confrontational towards Ms. Stanczak, the Assistant City Editor. In July, 1989, Plaintiff applied for the environmental beat but his request was refused because of his performance problems. In July, 1989, Mr. Erdman and Mr. Roberts met with Plaintiff to review his performance and clarify his job requirements. Some months later Plaintiff cursed Ms. Stanczak, his immediate supervisor, calling her "stupid" and repeatedly waved a scissor or ruler at her. Ms. Stanczak reported plaintiff's abuse and harassment to her supervisors.

In October, 1989, Mr. Erdman issued a written warning to Plaintiff because Plaintiff acted abusively towards him.

...Continued...

Plaintiff had written a story that Mr. Erdman and other editors believed was not suitable for publication. After his editing, Mr. Erdman left Plaintiff computer messages about completing the story. Although Mr. Erdman met with Plaintiff on October 13, 1989, by October 24, 1989 Plaintiff had failed to make any changes to the story. Soon after this, Plaintiff responded to Mr. Erdman's inquiry regarding the story by instigating an altercation and used abusive and threatening language shouting at Mr. Erdman.

After this incident, Plaintiff received a written warning. A meeting then took place including Plaintiff; Mr. Stan Schaeffer, plaintiff's union representative; Mr. Erdman; Mr. Tom Martin, defendant's Employee Relations Manager; and Mr. Roberts. At this meeting, Mr. Martin

---

...Continued...

discussed with Plaintiff warnings and complaints from other editors concerning Plaintiff's abusive conduct. Mr. Martin warned Plaintiff that he faced discharge if his behavior continued.

In February, 1990, Mr. Erdman again met with Plaintiff to discuss Plaintiff's job performance. Mr. Erdman told Plaintiff that his newsroom conduct had to improve and that if Plaintiff did not improve generally he risked receiving a failing evaluation.

Early in the week of April 23, 1990, Mr. Tobias, the Assistant City Day Editor, assigned Plaintiff a story concerning Lower Milford Township. Mr. Tobias told Plaintiff to submit the story by Friday, April 27, for inclusion in the Monday, April 30 paper. Later that week, Plaintiff told Mr. Tobias that he could not submit the story by that date. Mr. Tobias then directed

---

...Continued...

Plaintiff to submit an advance story concerning the Lower Milford planning board meeting for publication in the April 30 paper. Mr. Tobias also asked Plaintiff to leave him a message concerning the progress of the story and a copy of any work Plaintiff had prepared. On Sunday, April 29, Mr. Tobias checked and found no message from Plaintiff. Mr. Tobias then informed Mr. Erdman, the City Desk Editor, of Plaintiff's actions.

On Monday, April 30, Plaintiff submitted his weekly budget and described the planning board meeting as "probably not worth attending." Later that day, Mr. Erdman attempted to hand Plaintiff a written warning concerning his failure to comply with his instructions on the planning board story. Plaintiff refused to accept the warning because his union representatives were not present.

...Continued...

Learning of Plaintiff's actions, Mr. Al Roberts, the managing editor, instructed Mr. Erdman to attempt again to deliver to Plaintiff the warning. Plaintiff continued to refuse to accept the warning without union representation present. Mr. Erdman then told Plaintiff to leave and arrange Newspaper Guild representation within 24 hours for a meeting to discuss the disciplinary report that was being filed. Both Mr. Roberts and Mr. Larry Hymans, the Executive Editor, witnessed this encounter.

On May 1, 1990, Mr. Erdman placed the two warning notices in Plaintiff's office mailbox. Both warning notices stated that Plaintiff's union representative, Mr. Devlin, was available to attend a meeting, that Plaintiff should schedule the meeting and that Plaintiff faced termination for continued insubordination. Plaintiff failed to arrange the meeting. On May 2,

---

...Continued...

1990, Mr. Martin decided to terminate Plaintiff. Plaintiff received notice that his failure to arrange a meeting with his superiors to discuss his disciplinary situation was grounds for discharge, and that he was being terminated for this failure to arrange a meeting and his deliberate disregard for the internal disciplinary system of defendant, Morning Call.

COLLECTIVE BARGAINING AGREEMENT CLAIM

Construing the evidence in the light most favorable to Plaintiff, it is clear that Plaintiff has failed to present sufficient evidence from which a reasonable jury could find that Defendant Morning Call did not have good and reasonable cause to terminate Plaintiff. Plaintiff was terminated essentially because of insubordination.

...Continued...

Plaintiff claims his termination resulted from a management conspiracy designed to cover up management's errors and force Plaintiff to accept responsibility for mistakes he did not make. Plaintiff contends that all the editors decided to terminate him based upon Mr. Erdman's false assertions that Plaintiff had missed a deadline on an important story and that Plaintiff had physically threatened him. Plaintiff further claims that when he arrived at work on Tuesday, May 2, 1990, Mr. Erdman kept Plaintiff from meeting with his union representative who was there to help Plaintiff process a grievance. In Plaintiff's eyes, this cover up does not constitute good and reasonable cause for his termination.

However, there is no evidence that management participated in a cover-up. It is clear that Plaintiff was terminated

---

...Continued...

because he used threatening language towards David Erdman, failed to accept written warnings and failed to schedule a disciplinary meeting even though Ron Devlin, his union representative, was available. Further, Plaintiff's career with Defendant was marred by repeated instances of misconduct, harassment of fellow employees and disregard for warnings from management. The evidence show that Defendant's management handled Plaintiff's disciplinary situation in a reasonable and professional manner in compliance with the Collective Bargaining Agreement. There is not a scintilla of evidence that Defendant lacked good and reasonable cause to terminate Plaintiff.

Further, Plaintiff failed to present any evidence contradicting Defendant's stated reasons for discharging him. In fact, Plaintiff's counsel conceded in his

---

...Continued...

closing speech that Larry Hymans, the executive editor told the truth in testifying that Plaintiff was terminated for his failure to schedule a meeting. Plaintiff failed to show that Mr. Hymans' stated reasons did not constitute good and reasonable cause. The jury was not free to speculate on possible reasons for Plaintiff's discharge, it could decide this issue on the evidence presented.

Mr. Hymans testified that Defendant's internal disciplinary system required meetings to resolve disciplinary problems, and that other employees consistently participated in this disciplinary system. [1] Mr. Hymans underscored the importance of this system when he stated:

...Continued...

Beckett Aviation, 687 F.Supp. 985, 987 (W.D. Pa. 1988).

4. Plaintiff had himself previously participated in the system by accepting

> [P]rogressive discipline is extremely important to our corporation, to our company, to our operation. If we can't establish some sort of rules of order and discipline, then nobody would follow any system at all.
>
> Our experience typically over time was when we asked people to sit down, and if they wished to have a union representative they did it. They accepted their paperwork; they accepted the discipline. They sat down with, or without, their union representative. And if we could not impose some sort of an orderly situation, then there would be chaos.
> Transcript March 16, 1993, p. 8-9.

Plaintiff refused to comply with Defendant's disciplinary system. It was vital to Defendant to maintain employee discipline for a successful and effective operation. Plaintiff's deliberate disregard for this system jeopardized the disciplinary process and constituted good and reasonable cause for discharge. Thus, "without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but

---

...Continued...

one conclusion as to the verdict that reasonable men could have reached", and, therefore, a motion for judgment is appropriate. Simblest v. Maynard, 427 F.2d 1, 4 (2d Cir. 1970). The record contains no reasonable basis for the jury to have drawn any reasonable inferences in support of their verdict. Accordingly, Defendant's motion has been granted.[1]

...Continued...

disciplinary notices and timely scheduling meetings.

5. Plaintiff also contended that management had decided to terminate him on Tuesday, May 2, 1990 and not Wednesday, May 3, 1990. However, Mr. Hymans, conceded by Plaintiff to be telling the truth, and every other defendant witness testified the termination decision was made on Wednesday after a recommendation on Tuesday. thus, no reasonable juror cold infer arbitrariness from this.
Plaintiff also asked the jury to compare Plaintiff with two other reporters who had been given disciplinary warnings for violating rules in writing stories. Mr. Hymans testified the distinction between

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1141

LEONARD KUCINSKI,
Appellant

v.

MORNING CALL, INC.

Appeal from the United States District Court For the Eastern District of Pennsylvania
D.C. Civil Action No. 90-cv-04535
(Honorable Daniel H. Huyett, 3rd)

...Continued...

those employees and Plaintiff was that the other two were on the first step of a progressive disciplinary system and Plaintiff was (admittedly) far advanced upon that progressive system. Plaintiff had been warned in October, 1989 that further incidents could result in termination. Mr. Hymans specifically stated that Plaintiff was recommended for discharge because "[W]e've had several writeups and a suspension, we're at the process now, we had nothing left in the progressive disciplinary system except to say the final step is to recommend termination." He further said that "[R]epeated infractions that evidence an unwillingness to conform one's conduct

Argued July 18, 1994

Before: SCIRICA, LEWIS and ROSENN,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant,and essentially for the reasons set forth in the Memorandum Opinion of the Honorable Daniel H. Huyett, 3rd dated February 22, 1994, and Order of August 12, 1993, it is

ADJUDGED AND ORDERED that the judgment of the district court entered January 5, 1994, be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,

/S/ A. SCIRICA
Circuit Judge

July 28, 1994

...Continued...

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1141

LEONARD KUCINSKI,
Appellant

v.

MORNING CALL, INC.

(D.C. Civ. No. 90-cv-04535)

Present: SLOVITER, Chief Judge,
BECKER, STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO,
ROTH, LEWIS, MCKEE and ROSENN*
Circuit Judges

*As to panel rehearing only.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision

---

...Continued...

having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT:

_____

Circuit Judge

Dated: August 30, 1994

...Continued...

to the reasonable standards of the employer, constitutes good cause for termination."